RECENT AMERICAN DECISIONS.

Supreme Court of Minnesota.

HERRICK v. MINNEAPOLIS AND ST. L. RAILWAY CO.

A cause of action which accrued in one state, under a statute of that state making every corporation operating a railroad in that state liable for all damages sustained by its employees in consequence of the negligence of other employees of such corporation when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed, may be maintained and enforced in another state, although there is in the latter state no similar statute, the common-law rule upon the subject prevailing.

The fact that such statute only applies to corporations operating railroads does not render it in conflict with the provision of the Fourteenth Amendment to the Federal Constitution, that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

APPEAL from an order of the District Court, Freeborn county.

Lovely and *Morgan*, for appellant.

J. D. Springer, for respondent.

MITCHELL, J.—The defendant owned and operated a line of railroad from Albert Lea, in this state, to Fort Dodge, in the state of Iowa. The plaintiff entered the service of defendant, in Iowa, as brakeman on one of its trains, to be operated wholly in that state. While coupling cars on his train, in the discharge of his duty in that state, plaintiff was injured through the negligence of the engineer in charge of the train, under such circumstances as to give him a right of action under a statute of Iowa, which makes every corporation operating a railway in that state liable for all damages sustained by any person, including employees of such corporation, in consequence of the neglect of agents, or by mismanagement of the engineers or other employees of such corporation, when such wrongs are in any manner connected with the use or operation of any railway on or about which they shall be employed: Section 1307, tit. 10, c. 5, Code of Iowa 1870. This action was brought to recover damages for the personal injury thus sustained in that state. The court below dismissed the action on the ground that the right of action thus accruing under the statute of Iowa could only be enforced in that state. The correctness of this ruling is the only question involved in this appeal.

The general rule is that actions for personal torts are transitory

in their nature, and may be brought wherever the wrongdoers may be found and jurisdiction of his person can be obtained. As to torts which give a right of action at common law, this rule has never been questioned, and we do not see why the transitory character of the action, or the jurisdiction of the courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common law. In actions *ex contractu* there is no such distinction, and there is no good reason why any different rule should be applied in actions *ex delicto*, whenever, by either common law or statute, a right of action has become fixed and legal liability incurred. That liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. Of course, statutes that are criminal or penal in their nature will only be enforced in the state which enacted them; but the statute under which this action is brought is neither, being purely one for the reparation of a civil injury.

The statute of another state, has, of course, no extra-territorial force, but rights acquired under it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the *right of action;* while all that pertains merely to the *remedy* will be controlled by the law of the state where the action is brought. And we think the principle is the same whether the right of action be *ex contractu* or *ex delicto.* The defendant admits the general rule to be as thus stated, but contends that as to the statutory actions like the present it is subject to the qualification that to sustain the action the law of the forum and the law of the place where the right of action accrued must concur in holding that the act done gives a right of action. We admit that some text writers—notably, Rorer, Inter-state Law—seem to lay down this rule, but the authorities cited generally fail to sustain it. We have examined all the numerous cases cited on this point by defendant, and we find only one which in our opinion sustains him, while several are really against him. Most of the cases thus cited belong to one or the other of the two following classes: First, cases which hold that statutes giving a right of action for injuries causing the death of another

having no extra-territorial operation, only apply to injuries inflicted in the state which enacted the statute, and not to injuries inflicted or acts done in another state. Such is the case of *Whitford* v. *Railroad Co.*, 23 N. Y. 465. This undoubtedly is the settled law, but it does not touch the present case. The second class consists of cases which hold that where the statute gives such right of action to the personal representatives of the deceased, it can only be maintained by an administrator or executor appointed and acting under the laws of the state which enacted the statute, taking the ground that this right of action is not a right of property which passes to the estate, but is for the benefit of the family or next of kin of the deceased, and therefore the statute contemplates the exercise of the power and the execution of the trust only by a personal representative appointed under domestic laws. To this class belong the cases of *Richardson* v. *Railroad Co.*, 98 Mass. 85, and *Woodward* v. *Railroad Co.*, 10 Ohio St. 121. Some courts refuse to adopt this rule. But this question is not involved in the present case.

A few cases appear to lay some stress upon the fact that the statutes of both states were similar, but rather as evidence of the fact that the statute of the state giving the right of action is not contrary to the policy of the laws of the state where the action is brought. Such is the case of *C., St. L. & N. O. Railroad Co.* v. *Doyle*, (Sup. Ct. Miss.) 8 Amer. & Eng. Ry. Cas. 171, in which after saying that the action may be asserted because of the coincidence of the statutes of the two states, the court adds: "And, independently of this, because a right of action created by the statute of another state, of a transitory nature, may be enforced here when it does not conflict with the public policy of this state to permit its enforcement; and our statute is evidence that the public policy of this state is favorable to such rights, instead of being inimical to them." But it by no means follows because the statute of one state differs from the law of another state, that therefore it would be held contrary to the policy of the laws of the latter state. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the state where made. To justify a court in refusing to enforce a right of action which accrued under the law of another

state, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. If the state of Iowa sees fit to impose this liability upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens.

The only case which goes to the length of holding that this action can not be maintained, is that of *Anderson* v. *M. & St. P. Railroad Co.*, 37 Wis. 321, which, on the facts, is on all-fours with the present case, and in which the court holds that such an action will only lie in the state of Iowa, which enacted the statute. But with due deference to that court, and especially to the eminent jurist who delivered the opinion in that case, we think they entirely failed to distinguish between the *right of action*, which was created by the statute of Iowa and must be governed by it, and the *form of the remedy*, which is always governed by the law of the forum, whether the action be *ex contractu* or *ex delicto*. It is elementary that the remedy is governed by the law of the forum, and this is all that is held by any case cited by the court in support of their opinion.

The case of *Bettys* v. *Milwaukee & St. P. Railroad Co.*, 37 Wis. 323, was an action brought under an Iowa statute to recover *double* damages for cattle killed in Iowa. This case was probably correctly decided upon the second ground stated in the opinion, viz., that the statute was *penal*, and therefore could only be enforced in the state which enacted it

The following cases, we think, support our conclusion that this action may be maintained, although we have no such statute in this state: *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Leonard* v. *Steam Nav. Co.*, 84 N. Y. 48; *Chicago, St. L. & N. O. Railroad Co.* v. *Doyle*, *supra*; *N. & C. R. Co.* v. *Sprayberry*, 8 Baxt. (Tenn.) 341. See also, *Selma, Rome & Dalton Railroad Co.* v. *Lacy*, 43 Ga. 461, and s. c. 49 Ga. 10.

The defendant further contends that the statute of Iowa is in violation of the Fourteenth Amendment to the Constitution of the United States, which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws."

The ground for this contention consists in the fact that the law does not apply to all persons, but only to railroad companies, thus imposing on them a liability not imposed on others. There is great danger that some of the provisions of this fourteenth amendment will be attempted to be applied to cases for which it was never designed. In view of the history surrounding its adoption, we doubt whether it was ever intended to apply to cases like the present. But, even if it was, we find nothing in this statute repugnant to its provisions. The provision of the constitutional amendment referred to does not surround the citizen with any protection additional to those before given under the constitutions of the states. It was not in the power of the states, before the adoption of this amendment, to deprive citizens of the United States of equal protection of the laws; the only change produced by making this constitutional principle a part of the federal constitution is to make the Supreme Court of the United States the final arbiter of cases in which a violation of this principle by state law is complained of. If a state, in view of the peculiar nature of the service upon railroads, and the danger incident to it, shall, as a matter of state policy, require these corporations, which are the creatures of its statutes, to assume the risk of injuries to their servant, resulting from the negligence of fellow-servants also in their employ, we think they have a right to do so. Statutes imposing special duties and liabilities upon railroad companies are to be found on the statute-books of almost every state, and if general in their application to all such corporations they are valid: *McAunich* v. *Ry. Co.*, 20 Iowa 338; *Johnson* v. *Chicago, M. & St. P. Ry. Co.*, 13 N. W. Rep. 673.

Order reversed.

The principal case is one of great interest, both on account of the important principle involved, and because, on first perusal, it seems opposed to the weight of authority upon the subject. While, however, it may seem and perhaps is thus opposed to the mere weight of common-law authority, it is believed that upon principle—which ought to prevail when the question is a new one, as this was in the State of Minnesota—the decision is entirely philosophical and correct.

Without inquiring into the foundation of the so-called doctrine of comity, whether it exists *ex comitate* or *ex debito justitiæ*, as to which different opinions may perhaps still exist, we find a substantial agreement among the authorities as to the general statement of the extent of its application, at least so far as relates to contracts and common-law transitory torts. As stated in the principal case, we cannot see how the case can be in any manner affected by the question whether the right of action is statutory

or common law. The distinction between statutory and common-law rights made by some of the authorities has little to commend it. See Mr. Bigelow's note to sect. 625 of the eighth edition of Story's Conflict of Laws, and the cases there cited.

Mr. Story in his valuable work upon the Conflict of Laws, sec. 38: (the italics are our own), says: "There is then not only no impropriety in the use of the phrase 'comity of nations,' but it is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another. It is derived altogether from the voluntary consent of the latter, and is *inadmissible when it is contrary to its known policy or prejudicial to its interests.* In the silence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume tacit adoption of them by their own government, unless they are repugnant to its policy or prejudicial to its interests."

With reference to this same subject, Dr. L. Bar, of Göttingen, says:

"Obligations arising from delicts, and from circumstances of a kindred nature, furnish a general exception to the universal application of the *lex domicilii* to the import of obligations. The obligation arising from a delict may have as its subject, 1st, reparation for the damage done, and 2d, a penalty to be paid to the injured person.

"As far as regards these obligations under the first head, the rules of law in reference to them contain no more than such instructions as every one who lives in the state where they are in force must observe in his dealings with other persons and things that happen to be there. It is obvious that by failing in this responsibility, the foreigner becomes subject to these laws; and as every state requires this submission of the citizen of other states in its territory, it must always recognise the same submission of its own subjects to a foreign state. The law of the place where the prejudicial act was done, or the prejudicial circumstances happened, decides the obligation to make reparation. * * * The law of the place of action must also be kept in view to this effect, that *the judge can never recognise a claim which the ideas of his own law pronounce to be immoral or indecent:*" Bar's Int. Law (Soule & Bugbee's ed.), sect. 66, p. 272, 273. The italics in the last paragraph are our own.

According to these authorities a civil cause of action, accruing in a foreign country, will be enforced in the courts of the forum, except where it is contrary to the known policy of the country where the action is brought or prejudicial to its interests. As respects contracts, it is believed that the above principle will be accepted as correct in every common-law court.

As respects torts, however, we find in the English reports and text books a qualification added, thus:

Mr. Foote says: "The action complained of must have been a legal wrong, both by the law of the place where it was done and by the law of England, where the action for damages is brought:" Foote's Priv. Int. Law, Pt. III., ch. ix., p. 393. See, also, p. 390 *et seq.*

Mr. Westlake says: "The *lex fori* and *lex loci delicti commissi* must concur in order that an act or an omission may be deemed tortious: Westlake's Priv. Int Law, ed. of 1880, ch. xi., p. 221.

"Neither can any act be treated as a wrong in England which is not such in the defendant by the principles of English law, notwithstanding that the defendant is liable by the laws of the country where the act was done. But 'the English court admits the proof of the foreign law * * * as one of the facts upon which the existence of the tort or the right to damages may depend; * * * and it then applies and enforces its own laws so far as it is

applicable to the case thus established:'" Westlake's Priv. Int. Law, ed. of 1880, sect. 187, citing *The Halley*, L. R., 2 P. C. 193.

"But the last section (187) must be understood without prejudice to this, that an act may be treated as a wrong in England which is not such in the defendant by the English law otherwise than as adopting some rule of public international law:" Id., sec. 188, citing *The Nostra Signora de los Dolores* 1813, Dodson 290, in which Scott, a part owner of a privateer, was held liable for her acts, although by the English law in the narrower sense, as between British subjects, he would not have been so liable, because his name did not appear in her register. In this case the court said that the English statute was passed for reasons of domestic policy, and that all its regulations were of a domestic description, but considered that it had no force as against foreigners.

In *The M. Moxham*, L. R., 1 P. D. 107, 111, the law respecting personal injuries and respecting wrongs to personal property, is stated by MELLISH, L. J., to be perfectly settled, that no action can be maintained in the courts of England on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed, and also wrongful by the law of England. The cases of *The Halley*, L. R., 2 P. C. 193, and *Phillips* v. *Eyre*, L. R., 6 Q. B. 1, are cited by this learned judge as conclusive upon the question. The case of *The Halley*, especially, is directly in point. That case was the case of a collision with a ship in foreign waters. By the law of the foreign country the ship was liable, and the owners were liable as owners of the ship; but by the law of England the ship and owners were not liable, because there was a pilot on board who was taken on board compulsorily, and who was navigating the ship, and the negligent act was his act. Upon this it was held, that notwithstanding the ship and the owners were liable according to the law of the country where the act was committed, yet inasmuch as they were not liable by the law of England, no action could be maintained against them.

Leaving the English authorities and referring to some American writers, we find Mr. Wharton laying down the rule as follows:

"The prevalent rule is, that to sustain an action for a tort committed abroad, the *lex fori* and the *lex loci delicti* must concur in holding that the act complained of is the subject of legal redress:" Wharton's Conflict of Laws, sect. 478. To sustain this proposition he cites Westlake Int. Law, sect. 186; Foote Int. Law 394, and the cases cited by the former author, together with a number of American cases, of which, so far as we can discover, only the case of *Nashville Railroad* v. *Eakin*, 6 Cold. 582, supports the doctrine of the text as broadly as it is stated.

Judge COOLEY, in his work on Torts (p. 472), says:

"Where a new right of action is given by the statute for that for which no action would lie at the common law, such action can only be brought within the state or country whose statute gives the right, and for wrongs there suffered. This has often been decided under those statutes which give an action for causing death by wrongful act, neglect or default." To maintain this proposition the learned author cites *Whitford* v. *Panama Railroad Co.*, 23 N. Y. 465; *Richardson* v. *N. Y. Cent. Railroad Co.*, 98 Mass. 85, and *Woodward* v. *Mich., &c., Railroad Co.*, 10 Ohio St. 121 (all referred to in the principal case); and *State* v. *Pittsburgh, &c., Railroad Co.*, 45 Md. 41, and *Needham* v. *G. T. Railroad Co.*, 38 Vt. 294, in both of which cases

actions were brought upon the statutes of the forum for injuries happening in another state. In the former case it did not appear what, if any legislation, existed upon the subject in the other state, and therefore the common law was presumed to exist; and in the latter case the common law was assumed to exist in the state where the injury happened, by which no right of action was given.

It will be observed that the cases last above cited all belong to the first and second classes referred to in the principal case; and with the exception, perhaps, of the case of *Nashville Railroad* v. *Eakin*, 6 Cold. 582, no American case has been found that holds in accordance with the English rule that in all cases the *lex fori* and the *lex loci delicti* must concur in holding that the act complained of can be the subject of legal redress. Of course all the authorities concur in holding that where the act is not wrongful by the law of the place where committed, it cannot be made unlawful by the statute of another state where the action is brought. Nearly all the cases cited by the American authors above quoted are cases of this description, and do not support the converse proposition that no action will lie where the act is actionable by the law of the place where committed, but not actionable by the law of the forum.

Referring now to the cases cited by the court as sustaining the decision in the principal case: in *Leonard* v. *Columbia Steam Nav. Co.*, 84 N. Y. 48, the action was brought in New York to recover damages for an injury done in Connecticut, and it appeared from the report of the case that the statutes of the two states upon this subject were substantially the same. In discussing the question, the court, per MILLER, J., after stating the rule that at common law personal actions, whether *ex contractu* or *ex delicto*, are transitory; that the right to recover in another state for an injury to the person for which the common law gives a remedy by action, rests upon the presumption that the common law prevails in the state where the injury was committed, and that the injured party could have recovered there had the action been brought in such state; and that the remedy in such cases is given by the courts of one country or state upon the principle of comity, which is due by one sovereign state or country to another under similar circumstances; proceeds to apply the same rule of comity to the case of similar statutes, stating that "in fact where there are similar statutes instead of the common law, the right to recover damages stands precisely the same as if the common law in both states relating to the subject prevailed." The case does not support the doctrine that the action would lie where the common law prevailed in only one of the states.

In *Selma, &c., Railroad Co.* v. *Lacy*, 43 Ga. 461, the court appear to have decided the case upon the same principle as that stated in the case last cited. In concluding his opinion, WARNER, J., said: "Inasmuch, therefore, as it does not affirmatively appear from the plaintiff's declaration that in the state of Alabama, where the injury is alleged to have been done, the laws of that state are similar to our own in respect to the injury for which redress is sought here under the provisions of our statute, or that the common law is not of force in that state in respect to the injury complained of, the court below erred in overruling the demurrer to the plaintiff's declaration." When the case subsequently came again before the court (49 Geo. 106), it was held that the court would be governed by the laws of its own state as to the mode of procedure in ascertaining the rights of the parties, but that what are their rights must be determined by the laws of Alabama, where the act complained of was done. In this case no right existing in

Alabama, there was none to be enforced in Georgia. While the rule of comity was assumed to be the basis of a decision enforcing the statute of another state, "not being contrary to the policy or prejudicial to the interests of this state," inasmuch as no cause of action appeared to exist in Alabama, the decision in question is negative in character, and not a direct authority in favor of the principal case.

In *Dennick* v. *Railroad Co.*, 103 U. S. 11, 17, Mr. Justice MILLER thus states the question before the court for decision: "It is understood that the decision of the court below rested solely upon the proposition that the liability in a civil action for damages, which, under the statute of New Jersey, is imposed upon a party by whose wrongful act, neglect or default death ensues, can be enforced by no one but an administrator, or other personal representative of the deceased, appointed by the authority of the state. And the soundness or unsoundness of this proposition is what we are called upon to decide." And it was held that the suit could be maintained by the personal representative of the deceased appointed under the laws of New York. The argument of the court goes to the extent claimed in the principal case, but inasmuch as the statutes of New York and New Jersey appear to be based upon the same principle, the case is not an authority upon the precise question involved in the principal case.

The case of *Chicago, St. L., &c., Railroad Co.* v. *Doyle*, is sufficiently stated in the opinion in the principal case; and, while not authoritative upon the question involved in the principal case, does, by way of argument, support the conclusion arrived at in the principal case.

In the case of *N. & C. Railroad Co.* v. *Sprayberry*, 8 Baxt. 341, the proposition contended for in the principal case is stated baldly, without argument or citation of authority, which deprives it of much of the weight it would otherwise possess.

In this unsatisfactory state of the common-law authorities upon this question, we think the court decided wisely in placing its decision upon the principle so well stated by Judge STORY and Dr. BAR in the passages above quoted. Although the English authorities holding that the act must be a legal wrong, both by the law of the place where the act was done and where the action is brought, appear to have settled the question in England, the rule contended for in the principal case seems much more in accordance with the analogies of the law in other respects, and much more rational. In conclusion it would seem that upon principle the only limitations upon the liability of the defend ant, in a case like the principal case, in a state other than that where the act was committed, should be that the liability sought to be enforced shall not be contrary to the policy of the state where the action is brought, or prejudicial to its interests.

MARSHALL D. EWELL.
Chicago.

Circuit Court, Eastern District of Arkansas.

CREDIT COMPANY (LIMITED) OF LONDON, ENGLAND, *v.* ARKANSAS CENT. RAILROAD CO., AND OTHERS.

A court of equity may authorize the receiver of a railroad to issue certificates of indebtedness and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements, but it is a power to be sparingly exercised; and when the road cannot be kept running without its exercise, except to a very limited extent, the sound policy is to discharge the receiver, or stop running the road and speed the foreclosure.

In the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustees.

Where a holder of railroad bonds alleged the trustee had filed a bill and obtained a decree of foreclosure for the principal of the bonds not due, as well as for the interest which was due, without the written request of the holders of one-third in amount of the bonds, which it was claimed was a necessary prerequisite by the terms of the mortgage to the exercise of the power to declare the principal debt due, and sought for this reason to avoid the foreclosure proceedings, *held*, (1) that it was competent for the trustee to file a bill to foreclose for the interest due: (2) that the plaintiff ratified the action of its trustee by filing and proving in the master's office, in the foreclosure proceedings, more than one-third in amount of all the bonds issued; and (3) that the absence of such a requisition did not affect the jurisdiction of the court, and a decree for a larger sum than was due was error merely, to be corrected on appeal, and that as the error was one of which the trustees could not complain, and there was no fraud, the bondholders were as much bound as the trustee, and could not avoid the decree, on this ground, in any form of proceeding.

When the property of a railroad company is sold under a decree of foreclosure, at which all persons are authorized to bid, the fact that it is purchased by the president of the company in his individual right will not in itself raise a trust relation between him and a holder of the bonds of the company, which will entitle the latter to treat him as a trustee of the property so purchased.

One claiming the right to avoid a purchase made by another at a judicial sale, or of treating the purchaser as a trustee, and availing himself of the purchaser's bid, cannot delay the assertion of this right to enable him to decide in the light of subsequent events whether he would or not be profited by its assertion.

IN Equity.

N. & J. Erb, for plaintiffs.

U. M. and *G. B. Rose*, and *C. C. Waters*, for defendants.

The opinion of the court was delivered by

CALDWELL, J.—The Arkansas Central Railroad Company was formed for the purpose of constructing a railroad from Helena to Little Rock, with a branch to Pine Bluff. The chief ultimate promoters of this enterprise were Stephen W. Dorsey and J. E.

Gregg. Dorsey was the president of the company, and its financial agent and manager, and generally controlled and conducted all the affairs of the corporation.

What is commonly called an exhaustive contract was entered into between the company and J. E. Gregg & Co. for the construction of the road, by the terms of which Gregg & Co. were to build the road for all its stock subscriptions and other assets, and a majority of its stock.

The directors of the railroad company and all its officers, except the president, seem never to have had more than a mere nominal existence after the making of this contract, From that time Gregg & Co. were regarded as owners of the road, and its assets in hand, as well as all that might thereafter be acquired.

Dorsey was a member of this firm also, and in the double capacity of president of the railroad company, and a member of the firm of Gregg & Co., he seems to have managed the financial affairs of both.

The company executed a mortgage to secure its first mortgage bonds, which were put upon the market and sold to the amount of $720,000. The defendant, the Union Trust Company of New York, was the trustee in this mortgage. Dorsey went abroad to effect a sale of the bonds, and succeeded in placing most of them in London and Amsterdam.

By the fall of 1872, forty-eight miles of the road, which was a narrow gauge, had been completed in an imperfect manner. The work of construction was never resumed after that date. About this time Dorsey engaged actively in politics, and having been elected to the United States senate in the early part of 1873, and the assets and resources of the railroad company having been exhausted, he and the firm of J. E. Gregg & Co. soon ceased to take any further interest in the enterprise; and the defendant Johnson, who had at the solicitation of Dorsey invested some money in the concern of J. E. Gregg & Co., was elected president, and had the control and management of the road, and the affairs of the company from that time until the commencement of proceedings to foreclose. The company had neither resources nor credit, and the earnings of the road were barely sufficient to keep it running, without making needed repairs and improvements. The construction of the forty-eight miles of road seems to have absorbed the proceeds of the $720,000 first-mortgage bonds of the company, and of state

aid and state levee bonds, and county and municipal subscriptions, amounting in the aggregate to some $2,000,000. The company was hopelessly insolvent. No interest was paid on its first-mortgage bonds, and on the 20th day of September 1876, the trustee filed a bill in the United States District Court at Helena, then in the western district, to foreclose the mortgage. The bill alleged that the holders of one-third in amount of the bonds had requested the trustee to foreclose. A receiver was appointed, upon whose application Judge PARKER authorized the issue of receiver's certificates to the amount of $75,000, to make necessary repairs and improvements on the road. Between the date of this order and the next term of the court, Helena was transferred to this district, and the judge of this district rescinded the order authorizing the receiver to issue certificates. The rescinding order was not made because the road did not stand in need of repairs. It was notoriously true that its condition was such as to make it dangerous to life and property to run cars over it; ties were rotten, iron worn out, rolling stock in bad condition, bridges insecure, culverts washed out, and the road-bed in many places too low, resulting in over-flows of the track and stoppage of trains. No repairs nor betterments had been put upon the road since it had been built.

It seems to be settled that a court of equity has the power in this class of cases to authorize its receiver to issue certificates of indebtedness, and make them a first lien upon the road, for the purpose of raising funds to make necessary repairs and improvements: *Wallace* v. *Loomis*, 97 U. S. 146, 162; s. c. 2 Woods 506, under title, *Stanton* v. *Alabama & C. Railroad Co.*

But it is a power to be sparingly exercised. It is liable to great abuse, and while it is usually resorted to under the pretext that it will enhance the security of the bondholders, it not unfrequently results in taking from them the security they already have, and appropriating it to pay debts contracted by the court. The history of *Wallace* v. *Loomis*, *supra*, furnishes an instructive lesson on this subject.

This court has uniformly refused to arm its receivers with such a dangerous power. When the road cannot be kept running without its exercise, except to a very limited extent, the safe and sound practice is to discharge the receiver or stop running the road, and speed the foreclosure.

In the case of *Paine* v. *Little Rock & Ft. S. Railroad Co.*,

April term, 1874, application was made to this court to authorize a receiver to issue certificates, which were to be a first lien, to build sixty miles of road, in order to earn a large and valuable land grant, which would lapse in a short time unless the road was completed. A majority in value of the first-mortgage bondholders, concurred in the application: and the orders of the court in the case of *Stanton* v. *Alabama & C. Railroad Co.*, 2 Woods 506 (the case was not then reported), and the case of *Kennedy* v. *St. Paul & Pac. Railroad Co.*, 2 Dill. 448, were pressed upon the attention of the court. But the order was refused upon the ground that it was no part of the duty of a court of chancery to build railroads, and that the assent of all the parties interested in the property could not make it such. And there is no difference, so far as relates to this question, between building a railroad and making extensive and general repairs and betterments, the cost of which sometimes approximates the cost of original construction. In the case referred to, of the Fort Smith railroad, the proceedings to foreclose were speeded, and a decree rendered to meet the exigencies of the case, which the Supreme Court approved, and said "was a much more desirable plan" than to issue receiver's certificates: *Shaw* v. *Railroad Co.*, 100 U. S. 612.

Before the order authorizing the receiver to incur debts for repairs and other purposes was rescinded, he had incurred debts to the amount of some $22,000, chiefly for ties and a machine-shop. The ties were indispensable if trains were to be kept running, and the machine-shop was a necessary and valuable property to the road, and its use a necessity, though that could probably have been had without purchasing the property. A final decree of foreclosure was rendered on the 17th day of March 1877. By the terms of the decree the purchaser was required to pay $40,000 in cash. This sum was required to pay the receiver's certificates, and other costs and expenses of foreclosure. Any amount bid in excess of the $40,000 could be paid in first-mortgage bonds. Unusual pains were taken to convey to the bondholders actual notice of the foreclosure proceedings, and holders of $661,000, out of a total of $720,000 of the first-mortgage bonds had actual notice of the foreclosure proceedings, and the time and place of sale. The present plaintiffs had opened negotiations looking to a foreclosure of the mortgage before the bill for that purpose was filed by the trustee; and before the sale under the decree it filed and proved in the

master's office bonds to the amount of $161,000, being the very bonds on which this suit is bottomed. The road was sold at the master's sale for $40,000 to S. H. Horner, as trustee for A. H. Johnson, the then president of the railroad company, and superintendent of the road under the receiver.

The plaintiff, by its agent, had notice of this sale, and appeared, by its attorney, in court and moved to open the biddings for the road, and the court passed an order that the biddings would be opened if the present plaintiff or any person should advance the bid $5000 during a period of ten days allowed for that purpose. The plaintiff, or its agent, declined to open the biddings. In the meantime Johnson had grown sick of his bargain, and made application to the court to set aside the sale and permit him to withdraw the purchase-money. This was refused, and the sale confirmed. Johnson then offered to turn the road over to the plaintiff, or any holders of the first-mortgage bonds who would pay him the amount of his bid within a period of some fifty days. This offer was communicated to the plaintiff by its agent, Sully, and declined.

It is clear, from the evidence, that the defendants Johnson and Horner and the citizens of Helena wished to have the bondholders purchase the road. They were extremely anxious that the road should be completed, and believed that its purchase by the bondholders would insure that result, and that nothing else would. After the plaintiff and other bondholders declined to take Johnson's purchase off his hands, he proceeded, as fast as he could raise means for that purpose, to put the necessary repairs and improvements upon the road, which embraced 50,000 new ties, five miles of new iron, the rebuilding of nearly all the bridges and culverts, raising the road-bed in many places, and expensive repairs of the rolling stock. He afterwards sold a half interest in the property to his co-defendant, John J. Horner. Not long after the purchase, railroad securities and property in the south appreciated very much, and, although the road in question was but a fragment, its value was enhanced by the general and unprecedented increase in the value of all railroad property. Its value was further enhanced by the construction of a trunk line—not projected when Johnson purchased—from Missouri to Texas, which connects with its western terminus at Clarendon, and by the extensive repairs and improvements put upon the road, which altogether made it worth from $100,000 to $200,000 at the time this suit was commenced, sup-

posing it to be free from incumbrances prior in time to the mortgage under which defendants claim.

The bill, which was filed five years after the sale, seeks to charge Johnson as a trustee for the bondholders on general charges of fraud against him, the Union Trust Company, and others, relating to the foreclosure and sale, and for alleged inadequacy of price. The latter charge was abandoned at the hearing, the counsel for the plaintiff conceding on the argument that the road sold for all it was worth in its then condition, and in view of the question of the lien for the state aid bonds.

The rule is well settled that in the absence of fraud the beneficiaries in railway mortgages are bound by what is done by their trustee:

"In such cases the trustee is in court for and on behalf of the beneficiaries; and they, though not parties, are bound by the judgment, unless it is impeached for fraud or collusion between him and the adverse party. The principle which underlies this rule has always been applied in proceedings relating to railway mortgages where a trustee holds the security for the benefit of the bondholders:" *Kerrison* v. *Stewart*, 93 U. S. 155, 160. "The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them. If a bondholder not a party to the suit can under any circumstances bring a bill of review, he can only have such relief as the trustee would be entitled to in the same form of proceeding:" *Shaw* v. *Railroad Co.*, 100 U. S. 605, 611. Although the bill charges fraud in general terms upon the trustee, in connection with the foreclosure suit, there is not a syllable of evidence to support the charge.

One point much relied on at the hearing to support the bill was that the bill to foreclose was filed by the trustee without the written request of the holders of one-third in amount of the bonds then outstanding, as required by the twelfth article of the mortgage; and that the decree requiring the payment of the principal sum of the mortgage debt was therefore erroneous. The late cases of the *Chicago, D. & V. Railroad Co.* v. *Fosdick*, 106 U. S. 47, are cited in support of this contention. The ruling in those cases does not aid the plaintiff's case, for several reasons: 1. The mortgage in the case at bar contains an important provision on

the subject which was not contained in the mortgage under consideration in the cases cited, and which would seem to authorize all that was done by the trustee, and the decree of the court for the whole debt. 2. It was undoubtedly competent for the trustee to file a bill to foreclose for the interest actually due, and that largely exceeded in amount the value of the road. 3. The railroad company does not complain of the decree, and the plaintiff is estopped to do so by reason of having filed and proved in the master's office more than one-third in amount of all the bonds issued, with full knowledge of all the facts. This was a ratification of the action of the trustee. 4. If it be conceded that the requisition of the holders of one-third in amount of the bonds was indispensable to authorize a decree for the full sum of the mortgage debt, that fact would not affect the jurisdiction of the court or the validity of its decree when collaterally attacked. The jurisdiction of the court to pronounce a decree in the case is not contested, and if it rendered a decree for more than was due it was error merely, which might have been corrected on appeal by the proper party in apt time. But if it be conceded that it was an error, it was one of which the trustee could not complain; and there being no fraud on the part of the trustee the bondholders are as much bound as the trustee, and cannot avoid the decree in any form of proceeding: *Shaw* v. *Railroad Co.*, *supra.*

It is needless to discuss in detail the charges of fraud contained in the bill. The plaintiff has lost all right to be heard by its own gross laches. In excuse for the long delay, the bill alleges the plaintiff was ignorant of the facts until recently. This allegation is not true. The plaintiff's agent had notice of all the facts, and testifies he communicated them to the plaintiff immediately after the sale. But the bill itself does not state a case that will excuse the delay. "A general allegation of ignorance at one time and knowledge at another is of no effect. If the plaintiff made any particular discovery it should be stated when it was made, what it was, how it was made, and why it was not made sooner. * * * There must be reasonable diligence, and the means of knowledge are the same, then, in effect as knowledge itself:" *Wood* v. *Carpenter*, 101 U. S. 135, 140; *Harwood* v. *Railroad Co.*, 17 Wall. 78; *Badger* v. *Badger*, 2 Id. 87.

In *Harwood* v. *Railroad Co.*, *supra*, there was a delay of five

years, and in *Twin-lick Oil Co.* v. *Marbury*, 91 U. S. 587, there was a delay of four years, and the court denied relief in both cases on the ground of laches. In the case last cited, the defendant, at the time he purchased the corporate property, was a stockholder and director in the company, and the bill, which sought to charge him as a trustee, was filed by the company, and not, as in the case at bar, by a bondholder. All parties in this case were authorized to bid at the sale, and the fact that Johnson was president of the railroad company and the plaintiff a holder of bonds of the company did not in itself raise a trust relation between them which would entitle the latter to charge the former as a trustee, and at his election treat his purchase as though made in trust for its benefit. It could only avail itself of Johnson's purchase by virtue of some agreement or fraudulent act on his part. The plaintiff does not rely upon any agreement, and if the conduct of Johnson was such as to entitle the plaintiff to avoid his purchase or avail itself of his bid, it ought to have exercised the right within a reasonable period. It could not delay the assertion of this right to enable it to decide, in the light of subsequent events, whether it would or not be profited by its assertion.

In *Twin-lick Oil Co.* v. *Marbury*, *supra*, Mr. Justice MILLER says: "No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed in a court of equity." That is precisely what the plaintiff asks the court to permit it to do in this case. It declined to take the property at the price bid by Johnson, because as matters then appeared, that seemed to be all or more than the property was worth. It was patent to all at the time of the sale that the alternative would be presented to the purchaser of expending at once a large sum for repairs and improvements on the road, or abandoning its use as a railroad altogether. And after these expenditures had been made it was exceedingly doubtful whether the earnings of the road would equal its running expenses. In view of these facts, and the further fact that it was claimed then that the lien for the $1,350,000 state aid bonds issued to the road was paramount to the lien of the mortgage under which the road was sold (which is still an open question so far as relates to this road), it is not surprising that it was difficult to find a bidder for the property at the minimum price fixed in the decree, or that

the plaintiff declined to take it at that price. Years afterwards, and when the property had greatly increased in value from causes not then foreseen, and from extensive repairs and improvements put upon it, and after other interests had intervened, and the plaintiff erroneously supposed the question of the lien for the amount of the state aid bonds was out of the way, it files this bill, and asks that it be permitted to do now what it declined to do then, take the property at Johnson's bid, and that he be decreed to be a trustee and required to account.

A more inequitable demand, considering the facts of the case, was probably never addressed to a court of equity. If it was settled that there was no lien on the road to secure the state aid bonds, the case would not be any more favorable for the plaintiff. Having declined to take the risk of purchasing the property when it was doubtful whether the investment would entail a loss or yield a profit it should not be permitted at this late day and in the light of subsequent events to reconsider that resolution. The profits, if in the end there are any, justly belong to the purchaser, who took the risk, and whose labor and capital have added largely to the value of the property. As was said by the court in *Wood* v. *Carpenter*, *supra*, it is impossible "to avoid the conviction that the plaintiff's conduct marks the difference between forethought in one condition of things and afterthought in another."

Laches need not be pleaded. If the objection is apparent on the bill itself, it may be taken by demurrer: *Maxwell* v. *Kennedy*, 8 How. 222; *Lansdale* v. *Smith*, 16 Cent. Law J. 28; s. c. 1 Sup. Ct. Rep. 350. And if the cause, as it appears on the hearing, is liable to the objection, the court will refuse relief, without inquiring whether there is a demurrer, plea or answer setting it up: *Sullivan* v. *Portland Railroad Co.*, 94 U. S. 811; *Badger* v. *Badger*, 2 Wall. 95.

The plaintiff and all other purchasers of the first-mortgage bonds have undoubtedly lost the money invested in them. But they did not lose it by the foreclosure proceedings. It was lost from the instant it was invested in bonds secured by a mortgage on a road which had an existence only in name. If they have any just ground of complaint, it would seem to be against those whose representations induced them to purchase the bonds, and who probably used the proceeds for purposes other than building the road.

Let a decree be entered dismissing the bill for want of equity, at plaintiff's costs.

AUTHORITY TO ISSUE RECEIVERS CERTIFICATES.—A mortgagee taking possession of the property mortgaged may expend upon it such sums as are necessary to preserve it from waste and dilapidation which might otherwise depreciate the security in value, or even render it entirely worthless. So a receiver taking possession on behalf of the mortgagee may expend money to stay waste or destruction of the security of his mortgagee. He may do whatever the mortgagee might himself do to preserve the property.

This is true of receivers of railways. They may use so much as may be necessary of the revenues of the road, during their possession of it, for the purpose of operating it and keeping it in good repair, suitable for the safe and rapid conveyance of persons and property. A stronger reason exists in the case of receivers of railways for allowing them thus to expend the revenues of the road, or even to borrow money to keep it in good running order and repair, than in the cases of receivers in possession of property purely private, such as a farm or a factory. This reason is the protection of the public in the continued use of the railway as a public highway. "If it were not for the public quality belonging to them, for the injury that would be done to the interests of whole communities that have become dependent on a railroad for accommodation in a thousand things, a chancellor might say to the parties most interested: 'Unless you furnish means for the protection of this property, which does not itself afford an adequate income for this purpose, it may become a dilapidated and useless wreck.' But the inconvenience and loss which this would inflict on the population of large districts, coupled with the benefit to parties who perhaps are powerless to take care of themselves, of preventing the rapid diminution of value and derangement and disorganization which would otherwise result, seem to require —not for the completion of an unfinished work, or the improvement, beyond what is necessary for its preservation, of an existing one, but to keep it up, to conserve it as a railroad property, if the court has been obliged to take possession of it—that the court should borrow money for that purpose, if it can not otherwise do so in sufficiently large sums, by causing negotiable certificates of indebtedness to be issued constituting a lien on the proceeds of the property, and redeemable when it is sold or disposed of by the court." Per MANNING, J., *Meyer* v. *Johnston*, 53 Ala. 348. And to the effect that a receiver may borrow money to preserve in good repair and condition the railway property intrusted to him, see *Hoover* v. *M. & G. L. Railroad Co.*, 29 N. J. Eq. 5; *Meyer* v. *Johnston*, 53 Ala. 237; *Kennedy* v. *St. P. & P. Railroad Co.*, 2 Dill. 448; *Jerome* v. *McCarter*, 94 U. S. 734; *Bank of Montreal* v. *C. C. & W. Railroad Co.*, 7 Cent. L. J. 267; 48 Iowa 518; *Stanton* v. *A. & C. Railroad Co.*, 2 Woods 506; *Wallace* v. *Loomis*, 97 U. S. 146; *Cowdrey* v. *Railroad Co.*, 1 Woods 331; *V. & C. Railroad Co.* v. *V. C. Railroad Co.*, 50 Vt. 14; Am. Ry. Rep. 497.

But may a court authorize a receiver to borrow money to buy new rolling stock, or new shops, to complete an unfinished road, or, still further, to build a new road as an extension, branch or feeder of the railway in his possession? Several cases answer this question affirmatively. In *Gibert* v. *Washington City, &c., Railroad Co.*, 33 Grat. 586, the court, without deciding the question as to the power of the court as an original proposition to make such expenditure, affirmed an order authorizing the disbursement of $10,000 for the construc-

tion of a branch road by the receiver, he having in fact already constructed it for about $8000, it proving a profitable feeder to the main line, and no objection to the expenditure having been made for more than two years. In *Meyer* v. *Johnston*, 53 Ala. 339, 341, the court refer to manuscript opinions in the cases of *Southerland, Trustee*, v. *Lake Superior Ship Canal Railroad & I. Co.*, before U. S. district Judge LONGYEAR, at Detroit, and *Hyde* v. *Soders Point Railroad Co.*, wherein receivers were authorized to borrow money to complete unfinished work. The former case came before the U. S. Supreme Court *sub nom. Jerome* v. *McCarter*, 94 U. S. 738, and the receiver's action in raising money to complete the work—a canal—by the issuance and sale of certificates of indebtedness, secured by his mortgage, was justified. "The canal was unfinished," say the court, "and there were in the receiver's hands no funds to finish it. Hence there was a necessity for making the order which the court made—a necessity attending the administration of the trust the court had undertaken. The order was necessary alike for the lien creditors and for the mortgagors." See also *Wallace* v. *Loomis*, 97 U. S. 162; *Stanton* v. *Ala. & Chat. R. R. Co.*, 2 Woods 506; *Wallace* v. *Loomis*, 97 U. S. 146.

In *Kennedy* v. *St. P. & P. Railroad Co.*, 2 Dill. 448, to prevent a valuable land grant in favor of a railroad company from lapsing, a receiver was appointed *at the instance of bondholders* of the company, whose principal security was said lands, and at their desire he was empowered to borrow money to complete the unfinished portions of the road, and his certificates were made a first lien on the road and lands of the company.

In *Miltenberger* v. *Railway Company*, 106, United States 206, authority was given the receiver to purchase new rolling stock, complete five miles of railway, build a bridge, and pay indebtedness to connecting roads for freight and ticket balances incurred before the receiver was appointed. By the construction of the five miles of railway and the bridge the company secured large donations in land and money, besides adding greatly to its business, and was enabled to transact properly the business it already had. Any indebtedness created by the receiver for these purposes was made a "first lien prior to all incumbrances upon said road." The order was affirmed by the Supreme Court of the United States.

From these cases the power to authorize a receiver in a proper case to issue and sell certificates to purchase new equipment, or to build new roads, would seem to be pretty firmly established, at least in extraordinary cases where such action by the receiver is deemed necessary for the security of the mortgagees.

But in *Meyer* v. *Johnston*, 53 Ala. 340, it was pointed out that, in preceding cases, the issue and the sale of receiver's certificates had been consented to by the prior mortgagees; and it was decided that a railroad receiver could not, in order to raise money to complete the road, create liens upon its property which will displace older liens. It was sought to compare such certificates to a bottomry bond, whose lien takes precedence of all prior claims on the vessel. The court refused to take this view. "A ship far from home, in distress and without resource, must perish, and perhaps her crew with her, if a bottomry bond, given then for repairs and supplies shall not have precedence of other liens upon the vessel. But the court does not consider a railroad on *terra firma* so beyond the reach of help from those who own it or are concerned in it, as to justify the adoption in such a case, of the rule relating to a ship abroad and about to perish." *Meyer* v. *Johnston*, 53 Ala. 345.

It was further pointed out that the railway company could not itself issue such obligations and give them the first

lien upon its property as against prior mortgagees or other lien holders. Its contracts were inviolable and it would not be permitted to impair them. Further, referring to the provision in the United States Constitution prohibiting a state from impairing contracts, the court said: "And certainly a court which is a portion of the government of a state cannot have power which is denied to the state in convention assembled. If, therefore, the action of a chancellor in this cause goes to the extent of taking the property of the defendant corporation into his hands for the purpose, through his appointees, of completing an unfinished work, or of enlarging or improving a finished one, beyond what is necessary for its preservation, and to that end—of raising money by charging the railroad and its appurtenances with liens which are to supersede older ones without the consent of the holders of these, he has inadvertently passed beyond the boundaries of a chancellor's jurisdiction. In our opinion no such power is vested or resides in any judicial tribunal." Id., 345, 346.

The borrowing of money by a receiver is certainly discouraged even by those courts which have permitted it. The Supreme Court of the United States, in *Shaw* v. *Railroad Co.*, 100 U. S. 612, say: "For some reason the idea of a receiver and receiver's certificates seems to have been abandoned, and what to our minds was a much more desirable plan, adopted. The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required without asking the courts to engage in the business of railroad building. The result, so far as incumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution."

If a receiver has by direction of the court taken moneys and used them, which should not have been so taken, since they belonged to other parties, the court will, for the rectification of the error, order the amount to be returned with interest, to the parties entitled to it: *Meyer* v. *Johnston*, 53 Ala. 347.

While a receiver may borrow money, authority to do so for the purpose of completing a branch, does not warrant a receiver in contracting for municipal aid to enable him to build such a branch: *Smith* v. *McCullough*, 3 Am. & E. R. R. Cases 159.

Where the net earnings of a railroad company are sufficient to purchase rolling stock and equipment, they should be so applied, and receivers will not be authorized to create a loan secured by a car trust for their purchase, merely in order to allow the earnings to be applied to the payment of interest due the bondholders: *Taylor* v. *P. & R. Railroad Co.*, 9 Fed. Rep. 1; 3 Am. & Eng. R. R. Cases 177.

Statutory receivers are strictly limited by the authority conferred upon them by the statute; thus in *Tennessee* v. *E. & K. Railroad Co.*, 6 B. J. Lea 353, a statute of the state provided that in case of the failure of the companies to pay certain bonded indebtedness, the governor should appoint a receiver of the road. Upon the happening of the contingency, he did appoint a receiver, and the question was as to his power to bind the state to pay an indebtedness for materials, &c., created by him as receiver. It was also sought to have these debts declared a first lien upon the proceeds of the sale of the road.

As to the position that the receiver, being an agent of the state, his contract

was the contract of the state, it was decided that this position, if true, would only make the petitioners creditors of the state, and would give them no rights whatever as against the property of the railroad company, nor any lien upon the property of the state, but only a claim against the state, not enforceable by action on account of the state's exemption from suit. It was also decided that the statute authorizing the appointment of the receiver, did not authorize him to contract debts to be paid otherwise than out of the earnings of the road, and further, that there was no obligation on the state to continue the receivership until the current indebtedness of the receivership was paid. The fact that the indebtedness created by the receiver, enhanced the value of the railway property, was decided not to add any strength to the claim, and the petitioners were held not entitled to the relief sought.

An application by receivers to issue certificates to cover certain expenses, and an order of court thereon, accordingly does not bind the receivers or the trust fund to pay particular items of such expenses, the propriety of whose payment is not before the court. And if it appears that certain creditors might at any time have retaken the property for which they ask payment in certificates, and further, that such payment would be to the disadvantage of the trust fund, the court will not compel the receivers to make such payment in certificates: *Coe* v. *N. J. Mid. Railroad Co.*, 27 N. J. Eq. 37.

If prior mortgagees do not assent to receivers' liens, these should be made expressly subject to the prior mortgages: *In re U. S. Roll. St. Co.*, 55 How. Pr. 286.

NATURE AND NEGOTIABILITY.—Receivers' certificates are not debts of the company, but of the receivers, backed by the pledged faith of the court that the property on the proceeds of which they are charged is in its possession, subject to be, and that it will be disposed of by it for the payment of them: *Meyer* v. *Johnston*, 53 Ala. 349. If the fund or property in the hands of the court be not sufficient to pay the certificates in full, then holders of them are entitled only to a *pro rata* share of such proceeds: *Turner* v. *P. & S. Railroad Co.*, 95 Ill. 134.

Generally such certificates contain no express promise to pay, but merely the receiver's acknowledgment of indebtedness. The fund against which they are drawn is uncertain. There is no one personally liable for their payment, which can only be coerced by application to the court which issued them. Only the fund or property under control of such court is bound for their payment, and that only when it is equitable to charge such fund with their payment. While, therefore, it may be within the power of the court to authorize the issuance and sale by the receiver of negotiable paper, yet ordinarily receivers' certificates are not negotiable: *Turner* v. *P. & S. Railroad Co.*, 95 Ill. 134; *Union Trust Co.* v. *C. & L. H. Railroad Co.*, 7 Fed. Rep. 513; *Staunton* v. *A. & C. Railroad Co.*, 2 Woods 506; *Bank of Montreal* v. *C. & C. Railroad Co.*, 48 Ia. 518; *Newbold* v. *P. & S. Railroad Co.*, 5 Bradw. 367.

Nor can the receiver appoint an agent to negotiate them for him. Their issuance and sale is a trust personal to the receiver, and he cannot delegate it to another, and relieve himself of responsibility: *Union Trust Co.*, v. *C. & L. H. Railroad Co.*, 7 Fed. Rep. 513.

If a court orders a receiver to issue certificates of indebtedness, for a specific purpose, to be made payable to the persons to whom it is delivered, or order, and one is issued to A., or bearer, which is negotiated by mere delivery, the holder will take the same subject to all equitable defences against the payee, and the printed order of the court on the back is notice to him that it was made payable to bearer, contrary to the order of the

court authorizing its issue: *Turner* v. *P. & S. Railroad Co.*, 95 Ill. 134.

So, a certificate issued by a receiver to pay debts and expenses incurred by his predecessor, but which is not in fact used on account of any indebtedness made by the former receiver, and for which the receiver issuing it received no benefit, will not be paid at the suit of the payee, or even of a holder for value: *Turner* v. *P. & S. Railroad Co.*, 95 Ill. 134; see also *Union Trust Co.* v. *C. & L. H. Railroad Co.*, 7 Fed. Rep. 513.

In *Humphreys* v. *Allen*, 101 Ill. 490, the court below had authorized the issue and sale of receivers' certificates to pay for indebtedness of the company incurred before the receiver was appointed, and with full notice of a prior mortgage. The Supreme Court express no opinion as to the power of the court to authorize the issuance of certificates for such purpose, but hold that if the holder of railroad bonds secured by trust deeds on the road, having notice of the appointment of a receiver, and an order of court directing him on his petition to issue certificates of indebtedness on which to raise money to discharge a chattel mortgage on the personal property of the company, and to pay taxes, current expenses, &c., and making such certificates a prior and first lien on all the property of the company, desires to question the power of the court to make such order, he must do so before such certificates are issued and sold to *bona fide* purchasers, or paid out to creditors of the company. After their issue and sale it will be too late for him, or purchasers from him with notice of the facts, to raise the question whether the subject-matter to which the certificates were applied, was within the scope of the power of the court in the preservation of the property for the benefit of all concerned. See also *Langdon* v. *V. & C. Railroad Co.*, 53 Vt. 228.

Especially will bondholders be bound when they constitute a committee of their number to represent them in matters appertaining to the management of the property, and such committee consents to the issuance of receivers' certificates: *Langdon* v. *V. & C. Railroad Co.*, 53 Vt. 228. But see dissenting opinion by WALKER, J., in *Humphreys* v. *Allen*, 101 Ill. 490.

INTEREST.—Provision may be made in such certificates for the payment of interest; but the court cannot authorize the receiver to pay usurious rates of interest either directly, as by making them draw a greater than the legal rate of interest, or indirectly, as by fixing their rate of interest at the highest legal rate, and authorizing their sale at a discount. *Meyer* v. *Johnston*, 53 Ala. 352.

PRACTICE.—If the order authorizing the issue of certificates is made without proper notice to all concerned, or is otherwise irregular, the proper mode of objecting to it is by application to the chancellor to vacate and set it aside. *Meyer* v. *Johnston*, 53 Ala. 350.

PAYMENT.—The usual mode of compelling payment of receivers' certificates is by application to the court authorizing their issue. But suppose the property in charge of the receiver has been sold and the court has made a final decree without providing for the payment of outstand ing certificates. If the receiver has been discharged, he cannot be sued. The court no longer has either the suit or the property in its control, and is powerless to compel payment of its obligations. Perhaps a purchaser would take the property subject to all claims against the receiver, which might therefore be enforced against him. This was so decided in *Farmers' L. & T. Co.* v. *Central Railroad of Iowa*, 7 Fed. Rep. 537. But in that case the court had especially reserved jurisdiction upon final deree to enforce as liens upon the property all liabilities incurred by the receiver.

REQUEST THAT TRUSTEE FORECLOSE. —The whole debt may be made to become due upon any default in the payment of interest or of principal. *Mallory* v. *W. S. H. Railroad Co.*, 35 N. Y. Superior Ct. 174. The writer has been able to find but one case especially construing the request to the trustee to foreclose. In *Railroad Company* v. *Fosdick*, 106 United States 47, it is held that the clause must be read in connection with the clause in the same article relating to the declaration of default. "The whole article must be taken together." It is to be construed *stricti juris*, with a leaning, if need be, in favor of the debtor, since the declaration of default is in the nature of a penalty or forfeiture.

It was further decided that the written request to the trustees to foreclose was a necessary condition precedent to the foreclosure proceedings; that it was not optional with the trustees to foreclose without such request, but that the latter was intended to secure to a majority of the bondholders "the right to veto the proceeding of the trustees." "Many cases may be mentioned," say the court, "to illustrate the importance in their interests of such a control, rather than to put it in the power of one, or a minority, to require all to accept what the majority might consider to be premature and less valuable satisfaction for their existing security. The larger number might think it to their advantage even to defer the collection of their overdue interest, much less not to anticipate the payment of the principal, even when the security was ample to meet both; for they might esteem the ultimate investment higher than present payment. While they could not and ought not to prevent others, even a single individual, from exacting the promptest payment of what is due and may be important as current income, by legal process, they may nevertheless rightfully object to an anticipation of payment that may in their opinion prove to be a sacrifice. And this becomes especially important when the present value of the security is insufficient to prepay the incumbrance, but contains the solid promise of future indemnity as an investment."

Chief Justice WAITE and Justice HARLAN dissented, holding that if no request were made, the trustees were not precluded from commencing foreclosure proceedings on their own motion. *Railroad Co.* v. *Fosdick*, *supra*.

It has also been decided that a trustee will be left to exercise his discretion as to the time of making sale under a decree of foreclosure, and as to making sale at all pending an appeal from the decree which the appeal does not supersede. *Farmers' Loan & Trust Co.* v. *Central Railroad Co. of Iowa*, 4 Dill. 546. And this, notwithstanding a committee of the bondholders requested the trustee to order a special master to proceed with the sale, and tried to compel him to accede to their request by application to the court.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Michigan.

ZIMMERMAN *v.* DEVIN.

Where a physician agrees in writing, for a valuable consideration, not to practice his profession in a certain city or *in its vicinity*, he is bound by his contract, and the remedy against him is by injunction. The injunction, however, should be precise, and define exactly what is meant by "in its vicinity." A distance of ten miles from the city limits on every side is suggested as being a proper area in this case.

APPEAL from Barry.

Clement Smith, for complainant.

Knappen & Van Arman, for defendant and appellant.

The opinion of the court was delivered by

SHERWOOD, J.—The parties in this case are both practising physicians residing in the city of Hastings, and carrying on the business of their profession. On the 4th day of June 1881, the defendant entered into the following contract with the complainant: "In consideration of the sum of $500, to me in hand paid, this 4th day of June, A. D. 1881, by Frank B. Zimmerman, M.D., the receipt whereof is hereby acknowledged and confessed, I agree as follows: To remain in the city of Hastings and vicinity, in the active practice of medicine with said Zimmerman, for a period not exceeding six months from this date, and to divide equally the receipts from said practice with him. At the end of six months from this date, I agree to relinquish and yield up to him my practice, and remove from said city and vicinity, and refrain from practising medicine in said city and vicinity, after said six months, for at least the term of five years immediately succeeding said six months, and I reserve the right to remove from said city and give up said practice as aforesaid any time after this date and before said six months shall expire." By agreement of the parties the time for defendant to quit practice and leave said city was extended until the 1st day of April 1882.

Complainant's bill avers that the said defendant, instead of complying with his agreement to quit practice in the city of Hastings and vicinity, thus made with the complainant, when said 1st day of April arrived absolutely refused so to do, and from that time to the present has continued to practice his profession in Hastings

and vicinity, and avers his intention to continue his practice there.

The answer admits defendant's continuance in practice at Hastings, and avers his right to continue by reason of certain understandings and dealings between the parties had subsequent to the making of the contract. The case was heard at the Barry circuit on pleadings and proofs, and the circuit judge made a decree in accordance with the prayer of complainant's bill.

Upon an examination of the record we think the conclusion of the circuit judge was correct. It very clearly shows a failure of the defendant to comply with his written agreement with the complainant and which non-compliance, according to the testimony of defendant himself, could scarcely fail to be an injury to complainant.

A discussion of the testimony is unnecessary, and could serve no useful purpose. It is sufficient to say the equity of the case is clearly shown to be with the complainant, and but one thing requires further notice—the decree restrains the defendant from practising his profession "*in the city of Hastings and vicinity.*" This clause of the decree is somewhat indefinite as to the extent of territory to which it applies, and may give rise to further misunderstanding between the parties. For the purpose of obviating any difficulty of this kind, the decree made by the circuit judge should be so modified as to make certain the limits of its operation. Of course, the extent of territory included in the term "vicinity of the city" must necessarily depend in a great measure upon the size of the city, its location and particular surroundings; and under all the circumstances as they appear upon this record, I think the territory surrounding the city for the distance of ten miles from its corporate boundaries a reasonable limitation, and one which may be safely regarded within the contemplation of the parties when they made their contract.

The decree at the circuit court should be modified accordingly, and, thus modified, must be affirmed, with costs.

CAMPBELL and COOLEY, JJ., concurred.

GRAVES, C. J.—I agree with the court below that the case established by complainant entitled him to relief, and I also agree that the proper mode of relief is by injunction. But I think the decree ought to be more precise. It pursues the wording of the

agreement, that the defendant should forbear business in the city of Hastings and "vicinity," and fails to prescribe what territory the parties understood by this expression. They meant by it to identify the space from which the defendant was to be excluded, but they did not use it as amounting to a definite description. The word itself is entirely indefinite as a term of description of the bounds of the territory, and it fails to fix in such manner as it should, for the purpose of an injunction, the particular limits which the defendant is not to pass. The defendant is entitled to be informed, on the face of the injunction, when he is not to act under peril of attachment, and it ought not to be left as a matter of speculation or conjecture. I am inclined to think that the sense of the parties is substantially answered by regarding the city limits, and a space extending ten miles on all sides therefrom, as the area from which the defendant was to be excluded, and I think the decree should be so varied as to correspond with this view, and in all other respects affirmed.

The rule laid down in the leading English case upon the subject, is to the effect that all general restraints of trade are void: *Mitchell* v. *Reynolds*, 1 P. Wms. 181. Still the objection that it is in restraint of trade, if certain other conditions are complied with, will not invalidate the contract. What these are will be our purpose to note. The case of *Lange* v. *Werk*, 2 Ohio St. 519, the leading American authority, holds that to render a contract in restraint of trade valid, it must appear, 1st, That the restraint is partial. 2d, That it is founded on good consideration. 3d, That it is reasonable and not oppressive: *Bremer* v. *Marshall*, 4 C. E. Green Ch. 537; *Wright* v. *Ryder*, 35 Cal. 342.

It is generally conceded that while a restraint is under certain circumstances void, yet, where certain limitations are imposed it becomes valid: *Smalley* v. *Greene*, 52 Iowa 241; *Hedge* v. *Lowe*, 47 Id. 137; *Cook* v. *Johnson*, 47 Conn. 175; *Curtis* v. *Gokey*, 68 N. Y. 300; *Ellis* v. *Jones*, 56 Ga. 504; *Hoagland* v. *Segur*, 38 N. J. L. 230. (Compare *Doty* v. *Martin*, 32 Mich. 462): *Dwight* v. *Hamilton*, 113 Mass. 175; *Peltz* v. *Eichele*, 62 Mo. 171; *Oregon Steam Nav. Co.* v. *Winsor*, 20 Wall. 64; *Perkins* v. *Clay*, 54 N. H. 518; *Maier* v. *Homan*, 4 Daly 168; *Guerand* v. *Dandelet*, 32 Md. 561; *Warfield* v. *Booth*, 33 Id. 63; *Morse Twist Drill Co.* v. *Morse*, 103 Mass. 73; *Jenkins* v. *Temples*, 39 Ga. 655; *Gillis* v. *Hall*, 2 Brews. 342.

THE RESTRAINT MUST BE PARTIAL.—It was early decided that a contract which was not partial in one or more particulars, was void. The restraint may be partial in respect of space, of time, and also in respect of the class of work done. Thus in *Gale* v. *Reed*, 8 East 80, the defendant covenanted not to exercise the business of a ropemaker during his life, except on government contracts, and the court held it good. The court also upheld the contract in *Davis* v. *Mason*, 5 T. R. 118, where an attorney bound himself not to practise within London, and one hundred and fifty miles from thence. So, also, the contract in *Whittaker* v. *Howe*, 3 Beav.

383, where attorneys and solicitors agreed not to practise in Great Britain for the space of twenty years, without the consent of the gentlemen to whom they had sold their business, was sustained. "The law will not permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry or his capital, in any useful undertaking in the kingdom, would be void. But it may often happen that the individual interest and general convenience under engagements not to carry on trade, or to act in a profession in a particular place, proper:" BEST, C. J., in *Homer* v. *Ashford*, 3 Bing. 328. Partial restraints were upheld in the following cases: *Davis* v. *Mason*, 5 T. R. 118; *Bunn* v. *Guy*, 4 East 190; *Whittaker* v. *Howe*, 3 Beav. 383; *Clerk* v. *Comer*, Cas. temp. Hardw. 53; *Proctor* v. *Sargent*, 2 Man. & Gr. 31; *Rannie* v. *Irvine*, 8 Scott N. R. 674; *Leighton* v. *Wales*, 3 M. & W. 545; *Mumford* v. *Gething*, 7 C. B., N. S. 305; *Gale* v. *Reed*, 8 East 80; *Nobles* v. *Bates*, 7 Cow. 307; *Pierce* v. *Woodward*, 6 Pick. 206; *Lange* v. *Werk*, 2 Ohio St. 520; *Duffy* v. *Shockey*, 11 Ind. 71; *Mott* v. *Mott*, 11 Barb. 128.

Where the contract entered into by the parties is confined in space, it seems the proper way is to measure the distance by the nearest way of approach to the place whence it is to be reckoned: *Leigh* v. *Hind*, 9 B. & C. 774; *Atkyns* v. *Kinnier*, 4 Ex. 776.

But it has been also held that where no means have been provided in the deed for measurement, it should be in a straight line: *Rex* v. *Saffron Walden*, 9 Q. B. (N. S.) 76; *Lake* v. *Butler*, 5 E. & B. 92; *Jewell* v. *Stead*, 6 Id. 350; *Duignan* v. *Walker*, 1 Johns. 446 Eng.

CONSIDERATION.—The contract in restraint of trade must be founded upon an adequate consideration. Says Lord ELLENBOROUGH: "The restraint on one side meant to be enforced, should in reason be co-extensive only with the benefits meant to be enjoyed on the other:" *Gale* v. *Reed*, 8 East 86.

The decisions in the English courts are to the effect that the adequacy of the consideration will not be inquired into, and the parties must act on their own idea as to its sufficiency: *Archer* v. *Marsh*, 6 A. & E. 959; *Pilkington* v. *Scott*, 15 M. & W. 657; *Hitchcock* v. *Coker*, 6 A. & E. 439; *Leighton* v. *Wales*, 3 M. & W. 551. And see *Guerand* v. *Dandelet*, 32 Md. 561. Still if there be a consideration for the contract, but it is in restraint of trade, it will, therefore, be void: *Chappel* v. *Brockway*, 21 Wend. 158; *Lawrence* v. *Kidder*, 10 Barb. 641; *Pierce* v. *Fuller*, 8 Mass. 223. In *Pierce* v. *Fuller*, *supra*, the court thought the case appearing to be a reasonable one, and that the consideration of one dollar having been fixed and adopted by the parties as adequate, was sufficient in law. Followed by *Perkins* v. *Lyman*, 9 Mass. 522. See, also, *Palmer* v. *Stebbins*, 3 Pick. 188; *Whitney* v. *Slayton*, 40 Maine 231. But see *Ross* v. *Sadgbeer*, 21 Wend. 166, opinion of BRONSON, J.

IT MUST BE REASONABLE.—It is not sufficient that the restraint be partial and founded upon consideration. The agreement must be reasonable. No precise boundary can be laid down, within which the restraint would be reasonable, and beyond which it would be unreasonable. The circumstances of each particular case must govern. Thus in one case it was held, an agreement not to practice surgery within ten miles of the plaintiff's residence, was reasonable and should be supported: *Davis* v. *Mason*, 5 T. R. 118. So, also, a contract entered into by an attorney, by which he agreed not to prac-

tise "within London and one hundred and fifty miles from thence," was sustained: *Whittaker* v. *Howe*, 3 Beav. 383. But an agreement by the defendant, a dentist, that he would abstain from practise within one hundred miles of York, was held void, on the ground that the distance rendered it unreasonable: *Horner* v. *Graves*, 7 Bing. 743. A covenant by a vendor of land, for himself and his assignees, not to sell marl from an adjacent tract of land, was held unreasonable and void: *Brewer* v. *Marshall*, 4 C. E. Green Ch. 537; and so is a covenant by the lessee to buy all his merchandise at the store of the lessor: *Crawford* v. *Wick*, 18 Ohio St. 190. For other cases where the contract has been held reasonable or unreasonable, according to the circumstances, see *Chesman* v. *Nainby*, 2 Str. 739; *Clerke* v. *Comer*, Cas. temp. Hardw. 53; *Davis* v. *Mason*, 5 T. R. 118; *Bunn* v. *Guy*, 4 East 190; *Whittaker* v. *Howe*, 3 Beav. 383; *Leighton* v. *Wales*, 3 M. & W. 545; *Linn* v. *Sigsbee*, 67 Ill. 75; *Callahan* v. *Donnolly*, 45 Cal. 152; *Maier* v. *Homan*, 4 Daly 168; *More* v. *Bonnet*, 40 Cal. 251; *Guerand* v. *Dandelet*, 32 Md. 561.

If the contract is reasonable when made subsequent, circumstances do not affect its operation: *Elves* v. *Crofts*, 10 C. B. 241; *Jones* v. *Lees*, 1 H. & N. 189; *Cook* v. *Johnson*, 47 Conn. 175.

In *Mallan* v. *May*, 13 M. & W. 511, the word "London," was construed to mean the city of London; but it seems to be competent to prove in each case in what sense the word was used: *Beckford* v. *Crutwell*, 1 M. & Rob. 187; 5 C. & P. 242. But the question of the extent of territory included in the name of a place, must be left to the jury; neither can it be demurred to because of the uncertainty: *Blanding* v. *Sargent*, 33 N. H. 245.

If the restriction as to place be not unreasonable, the fact that it is indefinite as to time does not invalidate the contract: *Bowser* v. *Bliss*, 7 Blackf. 344; *Beard* v. *Dennis*, 6 Porter 204; *McClurg's Appeal*, 8 P. F. Smith 51; *Cook* v. *Johnson*, 47 Conn. 175; and where the covenant is valid at common law, it will be specifically enforced in equity; *McClurg's Appeal, supra; Beard* v. *Dennis, supra; Palmer* v. *Graham*, 1 Parsons's Eq. 476.

In *Nobles* v. *Bates*, 7 Cow. 307, the agreement not to carry on a certain trade within twenty miles of a certain stand, was held binding. See *Alger* v. *Thacher*, 19 Pick. 51; *Vickery* v. *Welch*, 19 Id. 523; *Ross* v. *Sadgbeer*, 21 Wend. 166; *Jarvis* v. *Peck*, 1 Hoff. Ch. 479; *Grasselli* v. *Lowden*, 11 Ohio St. 349.

There is some conflict as to the divisibility of these contracts. Thus, where a contract was made not to carry on a certain business in the United States or a specified county therein, it was held that while the contract was void as to the former, it might be sustained as to the latter, upon the authority of *Green* v. *Price*, 13 M. & W. 698; *Beard* v. *Dennis*, 6 Porter (Ind.) 204; *contra*, *More* v. *Bonnet*, 40 Cal. 251.

Injunction seems to be the proper remedy, where a breach of the agreement is threatened, in cases of this nature: *Benwell* v. *Inus*, 24 Beav. 307; *Hodgson* v. *Cappard*, 30 L. J. Ch. 20; *McClurg's Appeal*, 8 P. F. Smith 51; *Butler* v. *Burleson*, 16 Vt. 176; *Whittaker* v. *Howe*, 3 Beav. 383; *Morris* v. *Colman*, 18 Vesey 436; *Rolfe* v. *Rolfe*, 15 Simm. 88; *Nicholls* v. *Stretton*, 7 Beav. 42; *Harrison* v. *Gardner*, 2 Madd. 198; *Howard* v. *Woodward*, 10 Jur. N. S. 1123; *Doty* v. *Martin*, 32 Mich. 462; *Morgan* v. *Perhamus*, 36 Ohio St. 517; *Dwight* v. *Hamilton*, 113 Mass. 175.

ADDISON G. MCKEAN.
Detroit, Mich.

Supreme Court of the United States.

CANADA SOUTHERN RAILROAD CO. *v.* GEBHARD.

Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government affecting the powers and obligations of the corporation, as the known and established policy of that government authorizes; and whatever is done by such government in furtherance of that policy which binds subjects of the government in like situation with himself, will necessarily bind him.

Except in the states of the United States where the passage of laws impairing the obligation of contracts is forbidden, a statutory provision for binding the minority of the holders of railroad bonds by the will of the majority is valid, and there is no reason why such provision may not be made as to existing as well as to prospective obligations.

An act of the Parliament of Canada approving a scheme of arrangement of the affairs of a railroad company, which scheme had received the assent of a majority of the bondholders, enacted that the scheme should be deemed to be assented to by all the holders of the mortgage bonds of the company. *Held*, that this act was binding on citizens of the United States who were holders of the bonds of the company at the time of its enactment.

THE opinion of the court was delivered by

WAITE, C. J.—What is now known as the Canada Southern Railway Company was originally incorporated on the 28th of February 1868, by the Legislature of the Province of Ontario, Canada, to build and operate a railroad in that province between the Detroit and Niagara rivers, and was given power to borrow money in the province or elsewhere, and issue negotiable coupon bonds therefor, secured by a mortgage on its property, "for completing, maintaining, and working the railway." Under this authority the company, on the 2d of January 1871, at Fort Erie, Canada, made and issued a series of negotiable bonds, falling due in the year 1906, amounting in all to $8,703,000, with coupons for semi-annual interest attached, payable, principal and interest, at the Union Trust Company, in the city of New York. To secure the payment of both principal and interest as they matured, a trust mortgage was executed by the company covering "the railway of said company, its lands, tolls, revenues present and future, property and effects, franchises and appurtenances." Every bond showed on its face that it was of this kind and thus secured.

Before the 31st of December 1873, the company became satisfied that it would be unable to meet the interest on these bonds maturing in the coming January, and so it requested the holders to fund

their coupons falling due January 1st 1874, July 1st 1874, and January 1st 1875, by converting them into new bonds payable on the 1st of January 1877, and by so doing only, in legal effect, extend the time for the payment of the interest, without destroying the lien of the coupons under the mortgage, or otherwise affecting the obligation of the old bonds. Some of the bondholders funded their coupons, in accordance with this proposition, and accepted the extension bonds, but, under the arrangement, their coupons were not to be cancelled until the new bonds were paid.

In this condition of affairs, the Parliament of Canada, on the 26th of May 1874, enacted that the Canada Southern Railway, which was the railway built by the Canada Southern Railway Company under its provincial act of incorporation, "be declared to be a work for the general advantage of Canada," and a "body corporate and politic within the jurisdiction of Canada," for all the purposes mentioned in, and with all the franchises conferred by, the several incorporating acts of the legislature of the province. This, under the provisions of the British North America Act, 1867, passed by the Parliament of Great Britain "for the Union of Canada, Nova Scotia and New Brunswick, and the government thereof," made the corporation a Dominion corporation, and subjected it to the legislative authority of the Parliament of Canada.

On the 15th of March 1875, another series of bonds, amounting in the aggregate to $2,044,000, or thereabouts, was issued and secured by a second mortgage to trustees. After the issue of all the bonds the company found itself unable to pay its interest, and otherwise financially embarrassed, and a joint committee, composed of three directors and three bondholders, after full consideration of all the circumstances, submitted to the company and to the bondholders "a scheme of arrangement of the affairs of the company," which was approved at a meeting of the directors on the 28th of September 1877. This scheme contemplated the issue of $14,000,000 of thirty-year bonds, bearing three per cent. interest for three years, and five per cent. thereafter, guaranteed, as to interest for twenty years, by the New York Central and Hudson River Railroad Company, the first coupons being payable January 1st 1878. These new bonds were to be secured by a first mortgage on the property of the company, and exchanged for old bonds at certain specified rates. The old bonds of 1871 were to be exchanged for new at the rate of one dollar of principal of the old for one dollar

of the new, nothing being given either for the past due coupons or the extension bonds executed under the arrangement in December 1873. The proposed issue of bonds was large enough to take up all the old indebtedness at the rates proposed, whether bonded or otherwise, and leave a surplus, to be used for acquiring further equipment, and for such other purposes of the company as the directors might find necessary. This scheme was formally assented to by the holders of 108,132 shares of the capital stock out of 150,000; by the holders of the bonds of 1871 to the amount of $7,332,000 out of $8,703,000; and by the holders of $1,590,000 of the second series of bonds out of $2,029,000 then outstanding. Upon the representation of these facts to the Parliament of Canada, the "Canada Southern Arrangement Act, 1878," was passed and assented to in the Queen's name, on the 16th of April 1878.

This statute, after reciting the scheme of arrangement, with the causes that led to it, and that it had been assented to by the holders of more than two-thirds of the shares of the capital stock of the company, and by the holders of more than three-fourths of the two classes of bonds, enacted that the scheme be authorized and approved; that the new bonds be a first charge "over all the undertaking, railway works, rolling stock and other plant" of the company, and that the new bonds be used for the purposes contemplated by the arrangement, including the payment of the floating debt. Section 4 is as follows:

"4. The scheme, subject to the conditions and provisos in this act contained, shall be deemed to have been assented to by all the holders of the original first mortgage bonds of the company, secured by the said recited indenture of the 15th day of December 1870, and of all coupons and bonds for interest thereon, and also by all the holders of the second mortgage bonds of the company, secured by the said recited indenture of the 15th day of March 1875, and of all coupons thereon, and also by all the shareholders of the Canada Southern Railway Company, and the hereinbefore recited arrangement shall be binding upon all the said holders of the first and second mortgage bonds and coupons, and bonds for interest thereon respectively, and upon all the shareholders of the company."

Under the arrangement thus authorized the New York Central and Hudson River Railroad Company executed the proposed guaranty, and the scheme was otherwise carried into effect.

The several defendants in error are, and always have been, citizens of the state of New York, and were, at the time the scheme of arrangement was entered into and confirmed by the Parliament of Canada, the holders and owners of certain of the bonds of 1871, and of certain extension bonds, these last having been delivered to them respectively at the Union Trust Company in the city of New York, where the exchanges were made, in December 1873. Neither of the defendants in error assented in fact to the scheme of arrangement, and they did not take part in the appointment of the joint committee. Their extension bonds have never been paid, neither have the coupons on their bonds of 1871, which fell due on the 1st of July 1875, and since, though demanded. The company has been at all times ready and willing to issue and deliver to them the full number of new bonds, with the guaranty of the New York Central and Hudson River Railroad Company attached, that they would be entitled to receive under the scheme of arrangement.

These suits were brought on the extension bonds and past due coupons. The company pleaded the scheme of arrangement as a defence, and at the trial tendered the new bonds in exchange for the old. The circuit court decided that the arrangement was not a bar to the actions, and gave judgments in each of them against the company for the full amount of extension bonds and coupons sued for. To reverse these judgments the present writs of error were brought.

Two questions are presented for our consideration:

1. Whether the "Arrangement Act" is valid in Canada, and had the effect of binding non-assenting bondholders within the Dominion by the terms of the scheme; and,

2. Whether, if it did have that effect in Canada, the courts of the United States should give it the same effect as against citizens of the United States whose rights accrued before its passage.

1. There is no constitutional prohibition in Canada against the passage of laws impairing the obligation of contracts, and the Parliament of the Dominion had, in 1878, exclusive legislative authority over the corporation and the general subjects of bankruptcy and insolvency in that jurisdiction. As to all matters within its authority, the Dominion Parliament has "plenary legislative powers as large and of the same nature as those of the Imperial Parliament:" *The City of Fredericton* v. *The Queen*, 3 Can. Sup. Ct. 259.

On the 20th of August 1867, the Parliament of Great Britain passed the "Railway Companies Act, 1867:" 2 Stat. 1332; 30 & 31 Vict., c. 127. This act provides, among other things, for the preparation of "Schemes of Arrangement" between railway companies, unable to meet their engagements, and their creditors, which can be filed in the court of chancery, accompanied by a declaration in writing, under the seal of the company, and verified by the oaths of the directors, to the effect that the company is unable to meet its engagements with its creditors. Notice of the filing of such a scheme must be published in the Gazette, and the scheme is to be deemed assented to by the holders of mortgages, bonds, debenture stock, rent charges and preference shares, when assented to in writing by the holders of three-fourths in value of each class of security, and by the ordinary shareholders when assented to at an extraordinary general meeting, specially called for that purpose. Provision is then made for an application to the court by the company for a confirmation of the scheme. Notice of this application must be published in the Gazette, and, after hearing, the court, if satisfied that no sufficient objection to the scheme has been established, may confirm it. Sect. 18 is as follows:

"The scheme when confirmed shall be enrolled in the court, and thenceforth the same shall be binding and effectual to all intents, and the provisions thereof shall, against and in favor of the company and all parties assenting thereto or bound thereby, have the like effect as if they had been enacted by parliament."

This act, it is apparent, was not passed to provide, for the first time, a way in which insolvent and embarrassed railway companies might settle and adjust their affairs, but to authorize the court of chancery to do what had before been done by parliament. Lord CAIRNS, L. J., said of it in *Cambrian Railways Company's Scheme*, L. R., 3 Ch. 294: "Hitherto such companies, if they desired to raise further capital to meet their engagements, have been forced to go to parliament for a special act, enabling them to offer such advantages by way of preference or priority to persons furnishing new capital as would lead to its being obtained. And parliament, in dealing with such applications, has been in the habit of considering how far the arrangements proposed as to such new capital were assented to, or dissented from, by those who might be considered as the proprietors of the existing capital of the company, either as shareholders or bondholders. The object of the present act * * *

appears to be to dispense with a special application to parliament of the kind I have described, and to give a parliamentary sanction to a scheme filed in the court of chancery, and confirmed by the court, and assented to by certain majorities of shareholders and of holders of debentures and securities *ejusdem generis.*" And even now in England special acts are passed whenever the provisions of the general act are not such as are needed to meet the wants of a particular company. A special act of this kind was considered in *London Financial Association* v. *Wrexham, Mold and Connah's Quay Railway Co.*, L. R., 18 Eq. 566.

In Canada, no general statute like that in England has been enacted, but the old English practice of passing a special act in each particular case prevails, and OSLER, J., said in *Jones* v. *Canada Central Railway Co.*, 46 U. C. Q. B. 261, "our statute books are full" of legislation of the kind. The particular question in that case was whether, after the establishment of the Dominion government, the provincial parliaments had authority to pass laws with reference to provincial corporations which would operate upon debentures payable in England, and held by persons residing there, but it was not suggested, either by the court or counsel, that a statute of the kind, passed by the Dominion Parliament in reference to a Dominion corporation, would not be valid as a law. So far as we are advised, the parliamentary authority for such legislation has never been doubted either in England or Canada. Many cases are reported in which such statutes were under consideration, but in no one of them has it been intimated that the power was even questionable.

In *Gilfillan* v. *Union Canal Company*, at the present term, it was said that holders of bonds and other obligations, issued by large corporations for sale in the market, and secured by mortgages to trustees, or otherwise, have by fair implication, certain contract relations with each other. In England, we infer from what was said by Lord CAIRNS, *Cambrian Railways Company's Scheme, supra,* they are considered as in a sense part proprietors of the existing capital of the company, and dealt with by parliament and the courts accordingly. They are not there, any more than here, corporators, and thus necessarily, in the absence of fraud or undue influence, bound by the will of the majority as to matters within the scope of the corporate powers, but they are interested in the administration of a trust which has been created for their common

benefit. Ordinarily their ultimate security depends in a large degree on the success of the work in which the corporation is engaged, and it is not uncommon for differences of opinion to exist as to what ought to be done for the promotion of their mutual interests. In the absence of statutory authority, or some provision in the instrument which establishes the trust, nothing can be done by a majority, however large, which will bind a minority without their consent. Hence it seems to be eminently proper that where the legislative power exists some statutory provision should be made for binding the minority in a reasonable way by the will of the majority; and unless, as is the case in the states of the United States, the passage of laws impairing the obligation of contracts is forbidden, we see no good reason why such provision may not be made in respect to existing as well as prospective obligations. The nature of securities of this class is such, that the right of legislative supervision for the good of all, unless restrained by some constitutional prohibition, seems almost necessarily to form one of their ingredients, and when insolvency is threatened, and the interests of the public, as well as creditors are imperilled by the financial embarrassments of the corporation, a reasonable "scheme of arrangement" may, in our opinion, as well be legalized as an ordinary "composition in bankruptcy." In fact, such "arrangement acts" are a species of bankrupt acts. Their object is to enable corporations created for the good of the public, to relieve themselves from financial embarrassments by appropriating their property to the settlement and adjustment of their affairs, so that they may accomplish the purposes for which they were incorporated. The necessity for such legislation is clearly shown in the preamble to the Grand Trunk Arrangement Act, 1862, passed by the Parliament of the Province of Canada, on the 9th of June 1862, before the establishment of the Dominion government, and which is in these words:

"Whereas, the interest on all the bonds of the Grand Trunk Railway Company of Canada is in arrear, as well as the rent of the railways leased to it, and the company has also become indebted, both in Canada and in England, on simple contract, to various persons and corporations, and several of the creditors have obtained judgment against it, and much litigation is now pending; and whereas the keeping open of the railway traffic, which is of the utmost importance to the interests of the province, is thereby imperilled, and the terms of a compromise have been provisionally

settled between the different classes of creditors and the company, but in order to facilitate and give effect to such compromise the interference of the legislature of the province is necessary."

The confirmation and legalization of "a scheme of arrangement" under such circumstances is no more than is done in bankruptcy, when a "composition" agreement with the bankrupt debtor, if assented to by the required majority of creditors, is made binding on the non-assenting minority. In no just sense do such governmental regulations deprive a person of his property without due process of law. They simply require each individual to so conduct himself for the general good as not unnecessarily to injure another. Bankrupt laws have been in force in England for more than three centuries, and they had their origin in the Roman law. The constitution expressly empowers the Congress of the United States to establish such laws. Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty and property. Bankrupt laws, whatever may be the form they assume, are of that character.

2. That the laws of a country have no extra-territorial force is an axiom of international jurisprudence, but things done in one country under the authority of law may be of binding effect in another country. The obligor of the bonds and coupons here sued on was a corporation created for a public purpose, that is to say, to build, maintain and work a railway in Canada. It had its corporate home in Canada, and was subject to the exclusive legislative authority of the Dominion parliament. It had no power to borrow money or incur debts except for completing, maintaining and working its railway. The bonds taken by the defendants in error showed on their face that they were part of a series amounting in the aggregate to a very large sum of money, and that they were secured by a trust mortgage on the railway of the company, its lands, tolls, revenues, &c. In this way the defendants in error, when they bought their bonds, were, in legal effect, informed that they were entering into contract relations not only with a foreign corporation created for a public purpose, and carrying on its business within a foreign jurisdiction, but with the holders of other bonds of the same series, who were relying equally with themselves for their

ultimate security on a mortgage of property devoted to a public use, situated entirely within the territory of a foreign government.

A corporation "must dwell in the place of its creation, and cannot migrate to another sovereignty" (*Bank of Augusta* v. *Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid: *Railroad* v. *Koontz*, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel*, 103 U. S. 226); and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognised and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.

No better illustration of the propriety of this rule can be found than in the facts of the present case. This corporation was created in Canada to build and work a railway in that Dominion. Its principal business was to be done in Canada, and the bulk of its cor-

porate property was permanently fixed there. All its powers to contract were derived from the Canadian government, and all the contracts it could make were such as related directly or indirectly to its business in Canada. That business affected the public interests, and the keeping of the railway open for traffic was of the utmost importance to the people of the Dominion. The corporation had become financially embarrassed, and was and had been for a long time unable to meet its engagements in the ordinary way as they matured. There was an urgent necessity that something be done for the settlement of its affairs. In this the public, the creditors and the shareholders were all interested. A large majority of the creditors and shareholders had agreed on a plan of adjustment which would enable the company to go on with its business, and thus accommodate the public, and to protect the creditors to the full extent of the available value of its corporate property. The Dominion parliament had the legislative power to legalize the plan of adjustment as it had been agreed on by the majority of those interested, and to bind the resident minority creditors by its terms. This power was known and recognised throughout the Dominion when the corporation was created, and when all its bonds were executed and put on the market and sold. It is in accordance with and part of the policy of the English and Canadian governments in dealing with embarrassed and insolvent railway companies and in providing for their reorganization in the interest of all concerned. It takes the place in England and Canada of foreclosure sales in the United States, which in general accomplish substantially the same result with more expense and greater delay, for it rarely happens in the United States that foreclosures of railway mortgages are anything else than the machinery by which arrangements between the creditors and other parties in interest are carried into effect and a reorganization of the affairs of the corporation under a new name brought about. It is in entire harmony with the spirit of bankrupt laws, the binding force of which, upon those who are subject to the jurisdiction, is recognised by all civilized nations. It is not in conflict with the Constitution of the United States, which, although prohibiting states from passing laws impairing the obligation of contracts, allows Congress "to establish * * * uniform laws on the subject of bankruptcy throughout the United States." Unless all parties in interest, wherever they reside, can be bound by the arrangement which it is sought to have legalized the scheme may fail. All home creditors